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Supreme Court of the United States

October Term, 1965
No. 702

C. D. Drauckeb, Inc., a corporation; Fischbach and Moore, Inc. and C. D. Drauckeb, Inc., a Joint Venture; *sub nom*, Fischbach and Moore, Inc., a corporation; C. D. Drauckeb, Inc., a corporation; Fischbach and Moore, Inc. and C. D. Drauckeb, Inc., a Joint Venture,
Petitioner,

v.

International Union of Operating Engineers, AFL-CIO, Local Union No. 12, a labor organization and unincorporated association,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Hill, Farrer & Burrill
Carl M. Gould
Stanley E. Toben
Cecil E. Ricke, Jr.
411 West Fifth Street
Los Angeles, California 90013
Attorneys for Petitioner

Jefferies Banknote Company, Los Angeles — MA 7-9314

SUBJECT INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	6
Discussion	7
1. An important federal question is presented	7
2. The decision of the Court of Appeals disregards the Court's mandate for federal uniformity	9
3. The Court of Appeals' decision is in conflict with existing law	12
Conclusion	15

Opinion of the Court of Appeals for the Ninth Circuit ..... Appendix A

Opinion of the District Court for the Southern District of California, 198 F.Supp. 911 (S.D.Cal. 1961) ..... Appendix B

TABLE OF AUTHORITIES CITED

Cases	Page
Bryan Mfg. Co., 119 NLRB 502 (1957)	15
Burnett v. New York Central R.R., 380 U.S. 424 (1964)	8, 13
Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)	10
Clearfield Trust Co. v. United States, 318 U.S. 363 (1942)	8
Conrad v. Stitzel, 225 F.Supp. 244 (E.D.Pa. 1963)	12
Falsetti v. Local 2026 U.M.W., 34 F.R.D. 461 (W.D. Pa. 1964)	12
Fischbach and Moore, Inc. v. International Union of Operating Engineers, 198 F.Supp. 911 (S.D.Cal. 1961)	5
Guaranty Trust Co. v. York, 326 U.S. 99 (1945)	8
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corp., No. 387 (*cert. granted* Oct. 11, 1965)	6, 7
Kipbea Baking Co., Inc. v. Strauss, 48 CCH Lab.L.Rep. § 18705 (Dist.Ct. E.D.N.Y. 1963)	12
Leh v. General Petroleum Corp., 165 F.Supp. 933 (S.D.Cal. 1958)	12
Leh v. General Petroleum Corp., 330 F.2d 288 (9th Cir. 1964)	14
McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958)	8
NLRB v. Pennwoven, Inc., 194 F.2d 521 (3d Cir. 1952)	15
Reliford v. Eastern Coal Corp., 260 F.2d 447 (6th Cir. 1958), *cert. denied*, 359 U.S. 958 (1959)	13
San Diego Building Trades Council v. Gorman, 359 U.S. 236 (1959)	10
Smith v. Cremins, 308 F.2d 187, 189 n.9 (9th Cir. 1962)	12
Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962)	10
Teamsters Local 20 v. Morton, 377 U.S. 252 (1964)	10
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)	6, 8, 9, 10, 13, 15

Page

Tully v. Fred Olson Motor Serv. Co., 134 N.W.2d 393 (S.Ct. Wisc. 1965) 13

United Mine Workers v. Meadowbrook Coal Co., 263 F.2d 52 (6th Cir. 1959), *cert. denied*, 359 U.S. 1013 (1959) 12, 14

Codes and Statutes

Federal Employees' Liability Act 13

Labor-Management Relations Act 4, 5, 14

Section 301 ..... 6, 7

Section 303 ..... 1, 2, 5, 6, 7, 8, 10, 12, 13

National Labor Relations Act, Section 10(b) 15

Sherman Anti-Trust Act 14

Taft Hartley Act of 1947 7

United States Codes, Title 15, Section 156 (1955) 14

United States Codes, Title 28, Section 1254(1) 2

United States Codes, Title 29, Section 187 1

Textbook

Stumberg, *Conflict of Laws* 155 (3d Ed. 1963) 11

Miscellaneous

H.R. Rep. No. 245, 80th Cong., 1st Sess. 40 (1947) 15

Report of the Attorney General's Committee to Study the Anti-Trust Laws (1955), p. 381 14

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IN THE

Supreme Court of the United States

October Term, 1965

No. .....

C. D. DRAUCKER, INC., a corporation; FISCHBACH AND MOORE, INC. and C. D. DRAUCKER, INC., a Joint Venture; *sub nom,* FISCHBACH AND MOORE, INC., a corporation; C. D. DRAUCKER, INC., a corporation; FISCHBACH AND MOORE, INC. and C. D. DRAUCKER, INC., a Joint Venture,

Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, LOCAL UNION No. 12, a labor organization and unincorporated association,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, which reversed the decision of the District Court for the Southern District of California, which properly refused to apply the California three year statute of limitations to bar Petitioner's action brought under § 303 of the Labor-Management Relations Act, 29 USC § 187.

Opinions Below

The opinion and judgment of the Court of Appeals for the Ninth Circuit, which are not yet reported, appear *infra* in Appendix A. The opinion and judgment relating to the statute of limitations of the District Court for the Southern District of California, which is found in 198 F. Supp. 911 (S. D. Cal. 1961) appear *infra* in Appendix B.

Jurisdiction

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit, reversing the District Court's refusal to dismiss Petitioners' suit were entered on September 17, 1965. The jurisdiction of this Court is invoked under 28 USC § 1254 (1).

Question Presented

Whether, as the court below held, variegated state statutes of limitation control suits brought pursuant to Section 303 of the Labor-Management Relations Act.

Statute Involved

Prior to 1959, when the pertinent facts occurred, § 303 of the Labor-Management Relations Act (L.M.R.A.), in pertinent part, read as follows:

> "Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodi-

ties or to perform any services, where an object thereof is

• • •

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Statement

The Petitioner, C. D. Draucker, Inc., and Fischbach and Moore, Inc., entered into a joint venture agreement in 1956 [Pltf. Ex. 11; R. 60-61] in order to perform an electrical subcontract in the amount of $2,450,000.00 for J. H. Pomeroy Co. (the general contractor), at the Mer-

cury Division of the Ford Motor Company in Rivera, California. [Pltf. Ex. 10; R. 61.]

The joint venture commenced its electrical work pursuant to its contract with the general contractor in the Spring of 1956 and continued through the middle of July, 1957. [Tr. 37; Tr. 77; Tr. 226.] In the course of its work it extensively used a fork lift which was operated by an electrician employee of the joint venture pursuant to a collective bargaining agreement with Local Union No. 11 of the International Brotherhood of Electrical Workers ["IBEW"]. [Tr. 37; 48; 226.] Respondent, Local Union No. 12 of the International Union of Operating Engineers, AFL-CIO ["Engineers"], is a labor organization within the meaning of the L. M. R. A. [R. 61.]

In the latter months of 1956, and in the early part of 1957, the Engineers threatened representatives of the joint venture and representatives of the general contractor that unless work relating to the fork lift were assigned to the Engineers, the latter would strike and picket the joint venture and general contractor at the construction site. [Finding of Fact 8; Tr. 60; 61; 64; 66; 67; 133.] As a result of those threats and in an effort to protect itself and minimize damages and injury to it, the joint venture was compelled to cease using the fork lift on or about January 10, 1957. [Finding of Fact 9; Pltf. Ex. 10; Tr. 186.] Despite the joint venture's attempt to conciliate the dispute, the Respondent nevertheless picketed the joint venture and general contractor for the express purpose of forcing or requiring the joint venture to assign the use of the fork lift to members of the Engineers. This picketing occurred on February 5th and 6th, 1957. [Finding of Fact 10; Tr. 79.] The venturers were expressly told by Respondent that the picket line would remain in force until the use of the fork lift were assigned to Respondent members. [Finding of Fact 11; Tr. 79;

83.] The venture did not, and indeed could not, assign the work according to the demands of the Respondent because such assignment would involve a breach of its collective bargaining agreement with IBEW. [Tr. 383-384; Tr. 413-414; Tr. 416.] As a result of such threats and picketing, the joint venture suffered severe damages. [Finding of Fact 16; Tr. 76-77.]

Subsequently, the joint venture, in winding up its affairs, brought the action below for damages against the Respondent under § 303 of the Labor-Management Relations Act in the Federal District Court for the Southern District of California in November, 1960.

The District Court denied Respondent's Motion to Dismiss which was based upon the ground that Congress did not provide a limitations period when it adopted the Labor-Management Relations Act and, therefore, that the action was barred by the California state statute of limitations of three years for actions brought on liability created by statute. [Order Ruling on Certain Motions, R. 35, 36.]

The District Court held that since § 303 of the Labor-Management Relations Act does not provide a time within which a suit must be instituted that the policy supporting a uniform federal labor policy precludes the application of variegated state statutes of limitations, and that in the premises the proper period of limitations in such actions is the combination of the familiar doctrine of laches and no period of limitations at all. *Fischbach and Moore, Inc. v. International Union of Operating Engineers,* 198 F. Supp. 911 (S. D. Cal. 1961).

On July 1, 1964 judgment on the merits was entered for the Petitioner. Respondent timely filed Notice of Appeal and Petitioner timely filed Notice of Cross-Appeal

from the measure of damages applied by the District Court.

The United States Court of Appeals for the Ninth Circuit reversed the District Court's order refusing to dismiss, holding that in actions brought under § 303, the state statutes of limitations must be applied. In doing so, it held that Petitioner's cross-appeal relating to the computation of damages was rendered moot.

There is thus squarely presented the question whether suits for damages under § 303 of the Labor-Management Relations Act are governed by the variegated state statutes of limitations or to a uniform national labor limitations period formulated by the federal courts.

Reasons For Granting The Writ

1. This case presents an important federal question in that the Court of Appeals erroneously held that it was required to apply a state limitations period to a suit based upon and a right created by a *federal* statute, § 303 of the Labor-Management Relations Act. This federal question, as it relates to § 301 actions, is present in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corp.*, No. 387, for which this Court has granted a petition for certiorari and placed the matter on the summary calendar.

2. The decision of the Court of Appeals below, in refusing to apply a federal limitations but imposing rather a state limitations period in actions brought under § 303 of the Labor-Management Relations Act, disregards the clear mandate of this Court which requires uniformity in the application of federal labor law. See *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957).

3. The decision of the Court of Appeals below applying the state limitation period in actions brought under § 303 of the Labor-Management Relations Act disregards and is in conflict with other federal court decisions approving the holding of the District Court below.

Discussion

1. An important federal question is presented.

This Court has recognized the importance of the federal question presented in granting the petition for certiorari in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corp.*, No. 387, on October 11, 1965. In *Hoosier*, the question relates to Section 301 actions. There, the Court of Appeals for the Seventh Circuit found that the issue posed was one of state law rather than one bottomed on Section 301 and, therefore, applied the state statute of limitations. The instant case more clearly presents the critical federal question involved since there is no question that the instant case brought pursuant to Section 303 in the District Court was one for damages caused by the jurisdictional work stoppage and picketing threatened and effectuated by Respondent Engineers.

There can be no serious opposition to the position that the limitations period for actions brought under § 303 of the Labor-Management Relations Act is an important federal question. The express question is one of first impression for this Court, and should be treated now to avoid further confusion and error. When Congress adopted § 303 (and § 301) as part of the Taft-Hartley Act of 1947, it created a federal claim of relief but did not adopt a limitations period for such actions. While there is precedent for applying state statute of limitations

when Congress fails to set forth the limitations period for a federal cause of action, this Court has held that when the adoption of the state limitations period would frustrate a national uniform policy that is both desired and required, it is necessary to apply a federal limitations period. *Clearfield Trust Co. v. United States,* 318 U. S. 363 (1942); *cf. McAllister v. Magnolia Petroleum Co.,* 357 U. S. 221 (1958); *Burnett v. New York Central R. R.,* 380 U. S. 424 (1964). *Compare, Guaranty Trust Co. v. York,* 326 U. S. 99 (1945).

The continual development of a national unform labor law policy as required by *Textile Workers Union v. Lincoln Mills,* 353 U. S. 448 (1957) is a very important federal matter. Such a policy should not be frustrated, as would follow by the adoption of the rule established by the Court below. To apply a state limitations period to federal labor actions, as the Circuit Court did here, is anathema to the goal directed by this Court in its attempt to foster the establishment of a uniform national labor policy. The sophomoric application of variegated and diverse state limitation periods in § 303 actions would (1) derogate congressional intent and judicial expression of a labor policy requiring uniformity; (2) encourage derisive forum shopping; (3) lead to incongruous and inconsistent results; (4) retard the development of a viable national labor law; (5) result in overwhelming confusion as to which state's limitations period and which limitations period of that state would be applicable; and (6) unreasonably prevent Petitioner from recovering damages which it has suffered as a result of Respondent's wrongful conduct where Respondent has shown no prejudice from the Petitioner bringing this action into federal court within three and a half years following the wrongful conduct.

Thus, this Court has before it an issue of grave federal importance which it should consider.

2. The decision of the Court of Appeals disregards the Court's mandate for federal uniformity.

The District Court exercised the judicial inventiveness commended by this Court by adopting the rule of limitations which most appropriately serves the policy of achieving the uniformity unquestionably necessary in the scheme of our federal labor relations. See *Textile Workers v. Lincoln Mills,* 353 U. S. 448 (1957). In directing the federal courts to fashion a workable uniform federal labor law, this Court said:

> "We conclude that the substantive law to apply in suits under § 301 (a) is *federal law which the courts must fashion from the policy of our national labor laws.* . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will be in the penumbra of express statutory mandates. *Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy.* The range of judicial inventiveness will be determined by the nature of the problem. . . . *Federal interpretation of the federal law will govern, not state law.* . . .
>
> "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." (353 U. S. 448, 456, 457) [Emphasis supplied]

The Court of Appeals for the Ninth Circuit unfortunately disregarded the *Lincoln Mills* directive and

applied a rule arguably adequate in other areas of the law, but particularly inappropriate and parochial in light of the comprehensive sweep of federal labor law.

The Court of Appeals argues that the absence of a federal limitations period requires the application of the "general rule" of applying state limitations periods. This approach totally fails to consider the underlying policy which is served by following *Lincoln Mills* and adopting a federal limitations period. The absence of a specific limitations period in the Federal Act is not an invitation to create diversity; rather, the policy of the legislation requires, indeed demands, federal uniformity.

Since *Lincoln Mills*, this Court has continued to fashion a flexible, workable, but uniform national labor law, consistent with the policy established in that case. Even though jurisdiction of state courts has been recognized in this type of action, *Charles Dowd Box Co. v. Courtney*, 368 U. S. 502 (1962), state courts must apply federal law fashioned from federal policy. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U. S. 95 (1962). This court refused to allow the national labor policy to be frustrated when it refused to apply local theories of damages in a § 303 action. *Teamsters Local 20 v. Morton*, 377 U. S. 252 (1964); *cf., San Diego Building Trades Council v. Garman*, 359 U. S. 236 (1959).

Pointedly, diverse and variegated limitation periods would frustrate the policy of uniformity to a greater extent than would various theories of damages since the former acts to bar the action in toto, while the theory of damages merely determines the extent of relief available. When the outcome of the litigation is so gravely affected by a limitations period, a federal rule must be adopted. *Compare, Guaranty Trust Co. v. York*, 326 U. S.

99 (1945). See STUMBERG, CONFLICT OF LAWS 155 (3d Ed. 1963).

The rule applied by the Court of Appeals for the Ninth Circuit, if adopted throughout the judicial system of the United States, would generate a multitude of often illogical and incompatible local periods of limitation, a result directly contrary to the requisite uniform policy dictated by this Court. Limitations periods from one to twenty years would be available for application to such actions.[1]

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[1] *Alabama:* one year (Code of Ala., Tit. 7, §726); *Alaska:* two years (Alaska Stats., Title 9, Code of Civil Procedure, Chapter 10, §09.10.070); *Arizona:* one year (4 Ariz. Rev. St. Ann. Title 12—Courts & Civil Proceedings §12-541[3]); *Arkansas:* five years (Arkansas Stats. 1947 Ann. Volume 3B, Title 37 §37-213; *California:* three years (Code of Civil Procedure §338); *Colorado:* two years (Colorado Rev. Stats. 1953 Vol. 4, Chapter 87, §87-1-7); *Connecticut:* three years (§52-577); *Delaware:* three years (Delaware Code Ann. Volume 6, Title 10, Courts & Judicial Procedure §8106); *Florida:* three years (Florida Stats. Ann. Vol. 7, Title VIII, Limitations, §95.11[5][a]); *Georgia:* twenty years (Georgia Code Ann. Title 3, Actions, §3-704 [4360]); *Hawaii:* four years (Revised Laws of Hawaii 1955 [1963 Supp.] Chapter 205A); *Idaho:* three years (Idaho Code, Volume 2, §5-218[1]); *Illinois:* five years (Ill. Ann. Chapter 83—Limitations, §16); *Indiana:* fifteen years (Vol. 2, Burns Ind. Stats. Ann. 2-603); *Iowa:* no statute apparently applicable; *Kansas:* three years (Kansas Stats. Ann., Art. 5, Limitations of Actions §60-512[2]); *Kentucky:* five years (Kentucky Rev. Stats. §413.120[2]); *Louisiana:* ten years (Louisiana Civil Code, Vol. 15, Chapter 3 §3, Article 3544); *Maine:* six years (Rev. Stats. of Maine, Vol. 3, Chapter 112, §90); *Maryland:* no statute apparently applicable; *Massachusetts:* no statute apparently applicable; *Michigan:* six years (Mich. Stats. Ann. Vol. 23, §27A.5813); *Minnesota:* six years (Minn. Stats. Ann. Vol. 32 §541.05[2]); *Mississippi:* six years (Miss. Ann. Code, Vol. 1A, §722); *Missouri:* five years (Vernon's Ann. Missouri Codes, Chapter 34, §516.120[2]); *Montana:* two years (Rev. Codes of Montana, Vol. 7, Title 93, §93-2607); *Nebraska:* four years (Rev. Stats. of Nebraska 1943, Vol. 2, Chap. 25, §25-206); *Nevada:* three years (Nev. Rev. Stats. Vol. I, §11.190[3][a]); *New Hampshire:* six years (New Hampshire Rev. Stats. Ann. §508:4); *New Jersey:* two years or six years (§§2A:14-2 or 2A:14-1); *New Mexico:* four years (New Mexico Stats. 1953 Ann. Vol. 5, §23-1-4); *New York:* six years (McKinney's Consd.

3. The Court of Appeals' decision is in conflict with existing law.

The decision of the Court of Appeals below applying the state limitation period in actions brought under § 303 of the Labor-Management Relations Act disregards and is in conflict with other federal court decisions approving the holding of the District Court below. *Kipbea Baking Co., Inc. v. Strauss,* 48 CCH Lab. L. Rep. § 18705 (Dist. Ct. E.D.N.Y. 1963); *Falsetti v. Local 2026 U.M.W.,* 34 F.R.D. 461 (W. D. Pa. 1964). See *Smith v. Cremins,* 308 F.2d 187, 189 n.9 (9th Cir. 1962); *Conrad v. Stitzel,* 225 F. Supp. 244 (E. D. Pa. 1963); See also, *Leh v. General Petroleum Corp.,* 165 F. Supp. 933 (S.D. Cal. 1958).[2]

Laws of N.Y. Ann., Vol. 7B, Civil Practice, Law & Rules, §213); *North Carolina:* three years (Gen. Stats. of N. Carolina, Vol. 1A, Chapter 1, §1-52 Subd. [2]); *North Dakota:* six years (North Dakota Century Code Ann. Vol. 5 §28-01-16[2]); *Ohio:* six years (Page's Ohio Rev. Code Ann. Title 23, §2305.07); *Oklahoma:* three years (Okla. Stats. Ann. Title 12, §95[2]); *Oregon:* six years (Oregon Rev. Stats. Vol. 1, §12.080[2]); *Pennsylvania:* no statute apparently applicable; *Rhode Island:* no statute apparently applicable; *South Carolina:* six years (Code of Laws of S. Carolina, Vol. 2 §10-143[2]); *South Dakota:* six years (South Dakota Code (1939) Vol. 2 §33.0232[4][b]); *Tennessee:* ten years, (Tenn. Code Ann. Vol. 5, §28.310); *Texas:* four years (Vernon's Civil Stats. of Texas Ann. Vol. 1619, Art. 5529); *Utah:* three years (Utah Code Ann. §78-12-26 Subd. [4]); *Vermont:* no statute apparently applicable; *Virginia:* five years (Code of Virginia, Vol. 2, Title 8, §8-24); *Washington:* two years (Rev. Code of Wash. Ann. Title 4.16.130); *West Virginia:* two years (West Va. Code of 1961 Ann. Vol. 2 §5404); *Wisconsin:* six years (Wis. Stats. Ann. §330.19[4]); *Wyoming:* eight years (Wyoming Stats., Vol. 2, Title 1, §1-17).

The above cited periods of limitation are those that are discernible from the various state statutes; of course, their exactness cannot be guaranteed, since their application has long been subject to never-ending litigation, both in state and federal courts.

[2]The cases cited by the Court of Appeals to support its position are readily distinguishable. The Court, in *U.M.W. v. Meadowcreek Coal Corp.,* 263 F.2d 52 (6th Cir.), *cert. denied,* 359 U. S. 1013 (1959) was not presented with the application of a federal limitations period. Rather, the question was which of two *state*

This Court has refused to adopt a rule which would produce non-uniform periods of limitations for federally created causes of action under the Federal Employees' Liability Act. *Burnett v. New York Central R. R.*, 380 U. S. 424 (1964). Surely the policy of uniformity supporting *Burnett* is at least as strong in actions under § 303 of the L.M.R.A., particularly in light of the express mandate of *Lincoln Mills*.

Such uniformity can and should be obtained by the application of the familiar doctrine of laches. Mr. Justice Black and Mr. Justice Douglas, concurring in *Burnett*, stated:

> "The familiar equitable doctrine of laches provides the defendant with adequate protection against delay. . . . The long established federal rule of laches . . . is uncomplicated, uniform, and directly responsive to the problem." [380 U. S. 424, 437.]

Laches is particularly appropriate as a limitations device in the fluid and dynamic field of labor law. It enables flexible and equitable factors to be taken into consideration in an area that cries out for flexibility and discretion. These considerations are paramount, the pith and purpose of the policy, and more meaningful than the superficial concept of certainty.

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limitation periods would be applied, thus highlighting the difficulties presented by the rule applied by the Court of Appeals below. *Reliford v. Eastern Coal Corp.*, 260 F.2d 447 (6th Cir. 1958), *cert. denied*, 359 U. S. 958 (1959) also points up the difficulty in applying state periods of limitations. The District Court there applied a one year period, while on appeal, the Court of Appeals applied a three year period. In *Tully v. Fred Olson Motor Serv. Co.*, 134 N. W. 2d 393 (S. Ct. Wisc. 1965), the primary reason for applying the state period of limitations was that on the facts, the rights of the plaintiff would be preserved. [134 N. W. 2d at 399.] That Court quoted, with approval, language of the District Court in the instant case. It did not disapprove the application of the equitable doctrine of laches.

In contrast, the application of diverse state limitation periods results in federal rights being governed by at least fifty local legislatures. There will be no norm; no national policy; no uniformity. Indeed, in a number of states, it is unclear what state limitations provisions would be applicable. See *United Mine Workers v. Meadowcreek Coal Co.*, 263 F.2d 52 (6th Cir. 1959); *Leh v. General Petroleum Corp.* 330 F.2d 288 (9th Cir. 1964).[3]

The dubious quest for "certainty" is both illusive and elusive. There is no certainty in adopting the various limitation periods. Literally hundreds of cases can be found in federal digests where the courts, in federal anti-trust cases, had to wrestle with the knotty problems involved in determining what particular state's law and what particular law of that state was applicable. Congress, tired of continuing this litigious problem, took decisive action and corrected a dated statute. The L.M.R.A., while still in its embryonic stage, should not be thrown into that discarded imbroglio.

If uniformity of rule *must* be coupled with certainty of time, however, the appropriate course for this Court is to adopt a four-year federal limitations period drawn from the example of the Sherman Anti-Trust Act which provides private parties a remedy for tortious-type injuries. 15 U.S.C. § 156 (1955). This Court, cognizant of

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[3]In recommending the adoption of a *federal* limitation period in anti-trust cases, the report of the Attorney General's Committee to Study the Anti-Trust Laws (1955) stated at p. 381: "Since the anti-trust laws specify no statute of limitations for private damage actions, courts took to state law. This approach, however, has produced more questions than answers." As the Irish saying goes, "nothing is so uncertain as a sure thing."

The instant case was a further example of the difficulty of applying ambiguous state statutes; for even if a state statute is to be applied, there is a serious question as to whether it should have been the California three or four-year statute.

the utter confusion caused by some sixty years without a uniform anti-trust limitations period, may avoid such an unenviable result in the field of labor law by adopting a judicially created and congressionally approved limitations period, in accordance with the philosophy of *Lincoln Mills*.[4]

Conclusion

For the foregoing reasons, we respectfully request that a writ of certiorari to the United States Court of Appeals for the Ninth Circuit issue.

Respectfully submitted,

HILL, FARRER, & BURRILL
CARL M. GOULD
STANLEY E. TOBIN
CECIL E. RICKS, JR.

By Stanley E. Tobin
Attorneys for Petitioners

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[4]Alternatively, as in the situation when Congress originally failed to apply a limitations period for bringing an unfair labor practice charge, no limitations period should apply until Congress provides for one. Such was the case under the National Labor Relations Act until, after 12 years, Congress adopted Section 10 (b) to the Act, providing for a statutory period of limitations in the filing of a charge. See *NLRB v. Pennwoven, Inc.*, 194 F.2d 521, 524 (3d Cir. 1952); *Bryan Mfg. Co.*, 119 NLRB 502 (1957); H. R. Rep. No. 245, 80th Cong., 1st Sess. 40 (1947).

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS, ETC., *Appellant and Cross-Appellee,* vs. FISCHBACH AND MOORE, INC., a corporation, et al., *Appellees and Cross-Appellants.*	No. 19,476

[September 17, 1965]

Appeal from the United States District Court for the Southern District of California Central Division

Before: BARNES, JERTBERG, and ELY, Circuit Judges

ELY, Circuit Judge:

This is an appeal by the appellant labor union from a judgment in favor of appellees, plaintiffs below, for damages arising out of alleged unfair labor practices. The action was brought under § 303 of the Labor Management Relations Act, 29 U.S.C. § 187, which provides in subsection (b) that "whoever shall be injured in his business or property by reason [of any unfair labor practice committed by a labor organization] may sue therefor in any district court of the United States . . ., or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

The principal issue here involved is whether the action, filed more than three but less than four years after its accrual, is barred by lapse of time.

The problem arises because § 303 does not provide a time within which suit must be instituted. The court below, in reaching its decision, listed five possible solutions:

1. utilization of state statutes of limitations;

2. utilization of an arbitrary, judicially adopted period to be applied in all similar cases;

3. utilization of a federal statute of limitations applicable to suits of analogous nature;

4. utilization of the equitable doctrine of laches and

5. utilization of no period of limitations at all.

Fischbach & Moore, Inc. v. International Union of Operating Eng'rs, 198 F. Supp. 911, 915 (S.D. Cal. 1961). It concluded that, in cases such as this, the fifth solution, tempered by the fourth, is appropriate, and finding on the facts of the case that laches were not applicable, held that the action was not barred.

At the outset we must express our view that the trial court was clearly misguided in holding that actions under § 303 could be barred only by application of the equitable doctrine of laches. The court justified its decision by expressed concern for the interest of uniformity in the federally occupied field of labor relations. It rejected the California three-year statute of limitations, applicable to actions based on liability created by statute, Cal. Civ. Proc. Code 338.1, because to apply it, said the court, "'"would be inconsistent with the terms or defeat the purposes of the legislation of Congress," or defeat "the assertion of Federal rights, ..."'" 198 F. Supp. at 914 (Citations omitted.). It is true that we cannot achieve perfect uniformity when fifty possible time periods of limitation may apply, but resort to the doctrine of

laches, which adds complex factual considerations to each controversy, can create in every case a previously unknown period. This would result in time limitations inconsistent even within the same state where numerous controversies may have occurred. In short, adherence to the rule adopted by the court below could result only in uniform uncertainty.

There are strong reasons for the application of a six-month period, borrowed from § 10(b) of the LMRA, 29 U.S.C. § 160(b), which provides, "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charges with the Board . . . ." We think it is neither logical, nor just, nor in keeping with the policy which Congress has thus far articulated in the field of labor relations that a six-month period shall limit the filing of a complaint with the Board and that some different period, be it based on laches or a different statute of limitations, shall operate to limit the time for commencing a suit for damages under § 303 based on the same alleged unfair labor practice. See *Tully v. Fred Olson Motor Serv. Co.*, 56 L.R.R.M. 2960, 2964 (Wis. Cir. Ct. 1964), *rev'd*, 134 N.W.2d 393 (Wis. 1965). Given reasons for the enactment of § 10(b) were "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, and of course to stabilize existing bargaining relationships." *Local 1424, International Ass'n of Machinists v. NLRB*, 362 U.S. 411, 419, 4 L. Ed.2d 832, 80 Sup. Ct. 822 (1960) (Footnote omitted.). Certainly the distinctions between a complaint before the NLRB over an unfair labor practice and a private suit for damages for the same grievances are not so significant as to eliminate the same persuasive considera-

tions of public policy which demanded the quick disposition of labor-management controversy. But while we are tempted by Mr. Justice Douglas's appeal for "judicial inventiveness", made in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457, 1 L. Ed.2d 972, 77 Sup. Ct. 912, 923 (1957), we cannot adopt that phrase as a shibboleth to justify the pronouncement of a rule which would seem to be meet only for congressional action. In fact, the very presence of a six-month limitation period in § 10(b) and the absence of any period of limitation in § 301, 29 U.S.C. § 185, and § 303 make us more certain of our duty of forbearance.[1]

Unlike the states, Congress has enacted no general federal statute of limitations. As Mr. Justice Frankfurter wrote in *Holmberg v. Armbrecht*, 327 U.S. 392, 395, 90 L. Ed. 743, 66 Sup. Ct. 582 (1946), "If Congress explicitly puts a limit upon time for enforcing a right which it created there is an end of the matter. The Congressional statute of limitations is definitive. (Citations omitted.) The rub comes when Congress is silent." As a general rule courts bridge the lacuna created by congressional silence by application of periods of limitation prescribed by state statutes.

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[1]The Supreme Court of the United States has never been faced foursquare with the issue before us; however, Mr. Justice Black, dissenting in *Smith v. Evening News Ass'n*, 371 U.S. 195, 9 L. Ed. 2d 246, 83 Sup. Ct. 267 (1962) pointedly wrote,

> "Of course this Court could later, by another major statutory surgical operation, apply the six-months Labor Board Statute of Limitations to actions for breach of collective bargaining contracts under § 301. But if such drastic changes are to be wrought in the Act that Congress passed, it seems important to me that this Court should wait for Congress to perform that operation." 371 U.S. at 203.

The majority, perhaps in an effort to show that its decision in *Smith* was not intended to be extended so far, pointed out that "An unfair labor practice charge could have been brought but that was not pursued and the present proceeding was commenced after the six-month period prescribed in § 10(b) had expired." 371 U.S. at 197 n.5.

The Rules of Decision Act, 28 U.S.C. § 1652, provides that "the laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[2] The provisions have remained substantially unchanged since the original enactment of § 34 of the Judiciary Act of 1789. The act has been applied to federal-question and diversity cases alike, and on several occasions the Supreme Court has held that the appropriate state statute of limitations should be applied in federal-question cases. *E.g., Cope v. Anderson,* 331 U.S. 461, 91 L. Ed. 1602, 67 Sup. Ct. 1340 (1947) (insolvency of a national bank); *McClaine v. Rankin,* 197 U.S. 154, 49 L. Ed. 702, 25 Sup. Ct. 410 (1905) (insolvency of a national bank); *Campbell v. Haverhill,* 155 U.S. 610, 39 L. Ed. 280, 15 Sup. Ct. 217 (1895) (patent infringement); *McCluny v. Silliman,* 3 Pet. (28 U.S.) 270, 7 L. Ed. 676 (1830) (sale of United States land). In the discussions of these and other related cases, it is often commented that if Congress had intended a specific

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[2]It has been argued, perhaps as an academic exercise that the Conformity Act, not the Rules of Decision Act, is the federal statute which requires a federal court to apply a state statute of limitations and that the Conformity Act was overruled by the adoption of the Federal Rules of Procedure. 49 Yale L.J. 738 (1940). The attitude of the Supreme Court has generally been to treat the matter in the context of the Rules of Decision Act. But see *Hills & Co. v. Hoover,* 220 U.S. 329, 335-36, 55 L. Ed. 485, 31 Sup. Ct. 402 (1911).

For general discussions of time limitations and federal causes of action, see Blume & George, Limitations and the Federal Courts, 49 Mich. L. Rev. 937 (1951); Note, Federal Statutes Without Limitations Provisions, 53 Colum. L. Rev. 68 (1953); 49 Yale L.J., *supra.*

period of limitations it would have provided for one.[3] In the instant case we are compelled to agree. The fact is that Congress has remained silent on the matter of a limitations period applicable to § 303, and it does not appear that the omission was unintentional or intended to be supplied by "judicial legislation". Unlike many facets of state law, state statutes of limitations are commonplace and familiar to Congress, which, cognizant of the general federal rule, cannot be presumed to have expected the courts to skirt it.

Other circuit courts have applied state limitations periods to actions under both § 303, *UMW v. Meadowcreek Coal Corp.*, 263 F.2d 52, 61 (6th Cir.), *cert. denied*, 359 U.S. 1013, 3 L. Ed. 2d 1038, 79 Sup. Ct. 1149 (1959), and § 301, *Reliford v. Eastern Coal Corp.*, 260 F.2d 447, 455 (6th Cir. 1958), *cert. denied*, 359 U.S. 958, 3 L. Ed. 2d 765, 79 Sup. Ct. 797 (1959); see also *Tully v. Fred Olson Motor Serv. Co.*, 134 N.W.2d 393 (Wis. 1965), *reversing* 56 L.R.R.M. 2960 (Wis. Cir. Ct. 1964) (§ 301 case). Moreover, all law review critics of the decision here under review have written that the California statute of limitations should have controlled. 76 Harv. L.

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[3]In criticizing the court below for failing to apply the state statute of limitations, one author has written, "Section 4 of the Clayton Act, granting the right to private anti-trust suits, is very similar to § 303(b). Congress took forty years to provide a limitations period for this section; during this time the courts were content to apply the state statute of limitations. *E.g., Suckow Borax Mines Consol. Inc. v. Borax Consol., Ltd.*, 185 F.2d 196 (9th Cir. 1950)." 110 U. Pa. L. Rev. 1165, 1168, n.25 (1962).

The court below mentioned the possible application of the four-year period prescribed in the antitrust statute, 15 U.S.C. § 15(b). 198 F. Supp. at 915. This has been urged by appellees as an alternative ground for upholding the trial court's decision. We believe, however, that no federally prescribed period if limitations can be viewed as so closely analogous as to warrant its adoption into § 303. If we believed ourselves empowered to lift a federally created period from another statute, the period prescribed in Section 10(b), closely related, would be the most appropriate.

Rev. 1306 (1963); 60 Mich. L. Rev. 1164 (1962); 110 U. Pa. L. Rev. 1165 (1962); 64 W. Va. L. Rev. 442 (1962).

We are aware that, in certain circumstances, alternatives to the state periods of limitations may be adopted. *E.g., McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 2 L. Ed. 2d 1272, 78 Sup. Ct. 1201 (1958); *Holmberg v. Armbrecht*, 327 U.S. 392, 90 L. Ed. 743, 66 Sup. Ct. 582 (1946). But here, the statute itself, its legislative history, and the pressing weight of authority lead us to hold that California's three-year limitations statute should have been applied. Appellant's motion for judgment of dismissal should have been granted.

Appellees' cross-appeal, presenting the contention that the recovery was improperly limted, becomes moot.

Reversed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FISCHBACH AND MOORE, INC., a corporation; C. D. DRAUCKER, INC., a corporation; FISCHBACH AND MOORE, INC. AND C. D. DRAUCKER, INC., a Joint Venture,

Plaintiffs,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, a labor organization and an unincorporated association; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNIONS Nos. 12, 12A, 12B, 12C, and 12D, affiliated with the INTERNATIONAL UNION OF OPERATING ENGINEERS, labor organizations and unincorporated associations,

Defentdants.

No. 1251-60-TC. Civil.

OPINION

This matter is before the court for consideration of several motions by defendants. Because of the significant nature of the issues raised by defendants' motions to dismiss and strike, the court deems it necessary to file a separate opinion explaining the view taken on these motions.

The complaint in this action was filed on November 1, 1960, by two corporations and a joint venture as plaintiffs, for damages arising out of alleged unfair labor practices by defendant unions. The alleged union activities included strikes, picketing and work stoppages occurring at various times in February, May and July of 1957. Jurisdiction is based upon 28 U.S.C. §1331 (existence of a federal question), 28 U.S.C. §1332 (diversity of citizenship), 28 U.S.C. §1337 (action under a federal statute relating to commerce) and, primarily, upon 29 U.S.C. §187(b) (Labor Management Relations Act, §303(b)), which provides as follows:

> "Whoever shall be injured in his business or property by reason or (sic) any violation of subscription (a) of this section [pertaining to unfair labor practices by labor organization] may sue therefor in any district court of the United States subject to the limitations and provisions of Section 185 of this title [not here material] without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Motions to dismiss the action for failure to state a claim upon which relief might be granted and to strike certain allegations of the complaint as immaterial, redundant and outlawed by the statute of limitations were filed by defendants. Defendants contend that this action is barred by the statute of limitations and the basic issue for determination herein is the correctness or error of that contention. Although the issue of limitations is normally an affirmative defense to be raised in the answer (F.R.Civ.P., Rule 8(c)), where the passage of time is clearly apparent on the face of the complaint, it is well settled that the defense of limitations may be raised by a motion to dismiss. (*Anderson v. Linton*, 178 F.2d 304,

309-310 (7 Cir. 1949); *Wilson v. Illinois Central Railroad Company*, 147 F.Supp. 513, 516 (D.C.N.D. Ill. 1957); *Wagner v. New York, Ontario and Western Railway*, 146 F.Supp. 926 (D.C.M.D. Pa. 1956); *Wells v. Place*, 92 F. Supp. 473 (D.C.N.D. Ohio 1950). Such is the situation in the case at bar, if the defense is available at all.

No limitations provision is found in the Labor Management Relations Act or in any other federal statute which pertains specifically to actions brought under §303 of the Labor Management Relations Act. In this situation, defendants argue that where a federal statute creates a cause of action but does not adopt a period of limitations, a federal court trying an action based on such statute should adopt some applicable state statute of limitations; in this case, it is generally conceded that the only arguably applicable state statute of limitations is California Code of Civil Procedure §338.1, providing that an action upon a liability created by statute (other than a penalty or forfeiture) must be brought within three years. Plaintiffs, on the other hand, contend that the comprehensive scheme of federal regulation of the labor field and judicial interpretation thereof, particularly in the *Lincoln Mills* case (*Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957)), compel the conclusion that a uniform national regulation of labor activities is so essential that in the absence of an applicable federal statute of limitations, courts should apply no period of limitations until Congress decrees one, or, alternatively, that if some limitations-period must be chosen, it should be selected from an analogous federal statute; the statute suggested is 15 U.S.C. §15b, requiring suits for damages for violations of the antitrust laws to be brought within four years. The alleged activities in the case at bar occurred more than three years but less than four years before this action was filed.

The question here presented, to wit, whether a state statute of limitations is properly applicable in a cause of action based upon §303 of the Labor Management Relations Act, is one of first impression. Although a Tennessee limitations statute was applied in the case of *United Mine Workers of America v. Meadow Creek Coal Co.*, 263 F.2d 52 (6 Cir. 1959), *cert den* 359 U.S. 1013, the issue 359 U.S. 1013, the issue was *which of two* possible state statutes should be applied, the question of the proper applicability of *any* state statute apparently not being raised. No other published decision appears to bear on the question at all.

After careful consideration of this problem, the court has reached the conclusion that the often-expressed policy favoring a single, uniform, national labor law (see, e.g., *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 240 *et seq.* (1959); *Garner v. Teamsters Union*, 346 U.S. 485, 488, 490 (1953)) compels the conclusion that diverse state statutes may not be permitted to qualify or undermine a federally-created right. Hence, California Code of Civil Procedure §338.1 may not be invoked to bar this action and defendants' motions to dismiss and strike must be denied.

In reaching this result, the court takes as its point of departure the *Lincoln Mills* case (353 U.S. 448). Therein, the Supreme Court of the United States held that, in an action commenced under Section 301 of the Labor Management Relations Act, federal courts were not bound to apply state substantive law but were instead to apply *federal substantive law* "which the courts must fashion from the policy of our national labor laws". (353 U.S., at pages 456-457.) The *Lincoln Mills* case thus stands clearly and unequivocally for the proposition that, in actions under Section 301 at least, variegated state rules must yield to a uniform federal rule which must be

drawn from the statute where possible and from judicial interpretation where the statute is silent.

It is the opinion of the court that the reasoning of *Lincoln Mills* applies with as much, if not more, compelling force to actions brought under Section 303 of the Labor Management Relations Act. In the case of Section 301, a strong argument, which forms the basis of a lengthy dissent by Mr. Justice Frankfurter, had been presented to the effect that the statute was merely intended to be a grant of jurisdiction to federal courts over what had previously been a state cause of action for breach of contract. In rejecting the applicability of state law, the court had been forced to conclude that Section 301 "is more than jurisdictional — that it authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements . . .". (353 U.S., at pages 450-451.) Thus, what had clearly previously existed as a state cause of action was taken over as a federal cause of action to which federal law must be applied.

Actions under Section 303 are clearly of a different character. The right to bring an action for damages for unfair labor practices is a *federally-created right,* which did not exist at state law. The statute patently confers *new substantive rights* and confers jurisdiction to enforce these rights upon both state and federal courts. In such a situation, it appears axiomatic that a uniform body of federal law should be developed to regulate the rights and obligations of parties and that the right to recover should not be conditioned upon the fortuitous operation of a tremendous variety of state statutes of limitations. With these principles in mind, the court applies the *Lincoln Mills* doctrine, by analogy, to actions brought under Section 303 of the Labor Management Relations Act.

As was noted in *Lincoln Mills,* "[i]t is not uncommon for federal courts to fashion federal law where federal rights are concerned." (353 U.S., at 457.) Limitations upon the applicability of state law, including state statutes of limitations, and development of a uniform federal law, have been decreed by federal courts in numerous cases, including *McAllister v. Magnolia Petroleum Co.,* 357 U.S. 221 (1958); *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943); and *Davis v. Rockton & Rion R.R.,* 65 F.Supp. 67 (D.C.W.D.S.C. 1946).

The court is fully cognizant of the fact that in many cases where federal statutes, which create federal rights of action, do not include a period of limitations, it has been the practice of state and federal courts to apply state statutes of limitations. (See, e.g., *United Mine Workers v. Meadow Creek Coal Co.,* 263 F.2d 52, 61 *et seq.* (6 Cir. 1959), *cert. den.* 359 U.S. 1013; *Reliford v. Eastern Coal Corporation,* 260 F.2d 447, 455 (6 Cir. 1958), *cert. den.* 359 U.S. 958; *City of Atlanta v. Chattanooga Foundry & Pipeworks,* 127 F.23, 28 *et seq.* (6 Cir. 1903), aff'd 203 U.S. 390, 397 (1906); *Suckow Borax Mines Consolidated v. Borax Consolidated, Limited,* 185 F.2d 196, 207 (9 Cir. 1950), *cert. den.* 340 U.S. 943; *Levy v. Paramount Pictures,* 104 F.Supp. 787, 790 (D.C.N.D. Cal. 1952); *Reid v. Doubleday,* 109 F.Supp. 354, 358 (D.C.N.D. Ohio 1952). And see cases collected in 15 U.S.C.A. 431 *et seq.;* 15 U.S.C.A. 1960 Cumulative Annual Pocket Part 148 *et seq.*) However, where the application of a state limitations provision " 'would be inconsistent with the terms or defeat the purposes of the legislation of Congress' (citation), or defeat 'the assertion of Federal rights' (citation)" such state statute does not and should not apply. (*Davis v. Rockton & Rion R.R., supra,* 65 F.Supp. 67, 71 *et seq.* (D.C.W.D.S.C. 1946).)

The *Davis* case, *supra* (65 F.Supp. 67), involved an action under the Fair Labor Standards Act by railroad employees against their employer to recover unpaid minimum wages. At the time the action was brought there was no provision in the Act limiting the time for commencing action and no other applicable federal statute. The court held that no state statute of limitations could operate to bar the plaintiffs' action. The court stated (at page 72): "It is my opinion that the foregoing statute of limitations of South Carolina . . . unreasonably interferes with federal regulation of interstate commerce in violation of Article 1, Section 8 of the Constitution. The Fair Labor Standards Act is a statute regulating interstate commerce (citation), and is a matter of national concern. The purpose of the regulation is 'that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions,' (citation) and the Supreme Court has recognized that this purpose implies a 'Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto.' (Citation) . . . It is a familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. To the federal statute and policy, conflicting state law and policy must yield. . . ." The reasoning of the *Davis* case is clearly applicable to the case at bar. Like the Fair Labor Standards Act, the Labor Management Relations Act is a statute relating to interstate commerce. Similarly, the statute is a matter of national concern and it has been recognized by the Supreme Court that the purposes underlying the Labor Management Relations Act imply a policy of uniform application of the statute to all persons subject thereto. Further, the prohibitions of the Act would be set at naught and its benefits denied to the plaintiffs

herein if the California statute of limitations were applied. Finally, the plaintiffs in this action would receive treatment unequal to that accorded more fortunate plaintiffs in other states having longer limitations periods, if California Code of Civil Procedure §338.1 were utilized by this court. For all these reasons, the court declines to so act.

The sole remaining issue is to determine what time limitation federal courts should place on actions brought under Section 303 of the Labor Management Relations Act in the absence of a specific federal statutory provision governing the matter. As was noted in Mr. Justice Brennan's concurring opinion in *McAllister v. Magnolia Petroleum Co., supra,* 357 U.S. 221, 229, this is a practical problem in the administration of justice. Five possible solutions may be chosen: (1) utilization of state statutes of limitations; (2) utilization of an arbitrary, judicially-enacted, period to be applied in all similar cases; (3) utilization of an analogous federal statute of limitations; (4) utilization of the equitable doctrine of laches; and (5) utilization of no period of limitations at all. Doubtless, all of these possible solutions have been employed by some courts in some situations. As has previously been indicated, this court declines to adopt the first solution, although it has been widely used, notably in actions under the antitrust statute (15 U.S.C. §15), before the enactment of the federal limitations provision embodied in 15 U.S.C. §15b. The court is further of the opinion that to enact an arbitrary federal limitations period by judicial fiat would go far beyond the province of the judiciary; consequently, the second solution must also be rejected.

An analogous federal statute of limitations was adopted in *McAllister v. Magnolia Petroleum Co., supra,* where, in a combined action for negligence under the

Jones Act and unseaworthiness under the general maritime law, the court applied the statutory limitation enacted by Congress in the Jones Act to the concurrent common law action for unseaworthiness. (357 U.S., at 224) It has been suggested by plaintiffs in the case at bar that if the need is felt to apply some definite federal limitation to their right of action under Section 303 of the Labor Management Relations Act, an appropriate choice would be the four-year period prescribed by Congress in 15 U.S.C. §15b to be applied in cases arising under the antitrust statute, 15 U.S.C. §15. Although the types of rights created in the two statutes are similar in many respects, the court hesitates to adopt this suggestion because such a decision, which overlooks the many differences between the statutes and the differing Congressional policies which might be brought to bear, is ultimately tantamount to judicial legislation. Unlike the situation in *McAllister, supra,* the facts herein did not give rise to rights of action under the antitrust statute, and the two theories of action are of course in no way concurrent or interdependent.

Of the remaining solutions, the court is inclined to utilize a combination of the two. It is the court's strong opinion that where a choice of policy is to be made which limits the exercise of a legislatively created right, such choice is obviously most appropriately to be made by the legislative branch of the government. If Congress believes that stale claims are being prosecuted under Section 303, then it is up to Congress to determine the cutting-off point at which such claims are to be conclusively determined to be stale. Congress has previously done so, not only in the case of 15 U.S.C. §15 (as amended by 15 U.S.C. §15b), but also in the case of Section 10 of the Labor Management Relations Act (29 U.S.C. §160), pertaining to issuance of complaints by the National Labor

Relations Board for unfair labor practices (see *National Labor Relations Board v. Pennwoven, Inc.*, 194 F.2d 521, 524-525 (3 Cir. 1952)). Meanwhile, although in theory no limitations provision is in effect, as a practical matter the equitable doctrine of laches may be utilized to preclude recovery in any case where it appears that the plaintiff has delayed unconscionably in asserting his claim.

Accordingly, it will be ordered that defendants' motions to dismiss and strike be denied.

Dated November 6, 1961.

THURMOND CLARKE
United States District Judge.